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No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

CREDIT BUILDERS OF AMERICA, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a district court have subject matter jurisdiction under 28 U.S.C. § 1337 and § 1331 over an action by a communications common carrier to collect interstate telecommunications charges fixed by tariff filed pursuant to Section 203 of the Communications Act of 1934?

RULE 29.1 LIST

The parent company of MCI Telecommunications Corporation is MCI Communications Corporation. MCI Telecommunications Corporation has no subsidiaries other than wholly owned subsidiaries.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner MCI Telecommunications Corporation ("MCI") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered September 7, 1993 in the above-titled proceeding, on remand from this Court. The Fifth Circuit's judgment affirms dismissal of MCI's action for lack of subject matter jurisdiction, reinstating the decision vacated by this Court on June 7, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit filed September 7, 1993, has not been reported. It is reprinted at Appendix A, *infra*.

The opinion of the Court of Appeals for the Fifth Circuit entered January 12, 1993, is reported at 980 F.2d 1021. It is reprinted at Appendix D, *infra*.

The memorandum opinion of the United States District Court for the Northern District of Texas, Dallas Division (Buchmeyer, J.), has not been reported. It is reprinted at Appendix E, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 7, 1993.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Communications Act of 1934, as amended, Sections 1-3, 201-208, 401-402, 406-407, and 415, 47 U.S.C. §§ 151-153, 201-208, 401-402, 406-407, and 415. The pertinent text of these provisions is set forth in Appendix F, *infra*.

28 U.S.C. § 1337. Commerce and antitrust regulations

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . .

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

Last term this Court granted MCI's petition for certiorari in this case and vacated the Fifth Circuit's judgment affirming dismissal of MCI's action for lack of sub-

ject matter jurisdiction (No. 92-1566). On remand, the Fifth Circuit reinstated its prior decision. MCI now seeks plenary review or summary reversal of the Fifth Circuit's judgment.

MCI brought this action in the United States District Court for the Northern District of Texas to collect charges for tariffed interstate telecommunications services provided by MCI to respondent, Credit Builders of America, Inc. ("Credit Builders"). MCI alleged subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337, and the Communications Act of 1934, 47 U.S.C. §§ 151-609.

The Communications Act ("the Act") regulates interstate and foreign communications by wire and radio. 47 U.S.C. §§ 151-152. Section 203 of the Act provides for the publication and filing of tariffs under supervision of the Federal Communications Commission ("FCC"). 47 U.S.C. § 203(a). Section 203 makes clear that when a carrier files a tariff for a particular service, the carrier may collect only the charges specified in the tariff for that service. 47 U.S.C. § 203(c). MCI, a common carrier as defined by the Act, 47 U.S.C. § 153(h), provides interstate telecommunications services in accordance with the Act. MCI publishes and maintains with the FCC a tariff identified as "MCI Tariff F.C.C. No. 1" (the "Tariff").

MCI's complaint against Credit Builders alleged that MCI provided telecommunications services to Credit Builders under the Tariff from December 1990 to September 1991. MCI asserted that it performed all its Tariff obligations, but that Credit Builders failed to meet the Tariff payment terms. MCI sought judgment for $38,897.00, the total Tariff charges incurred by Credit Builders. Section 203 of the Act was the statutory basis for MCI's complaint. MCI did not allege any state law cause of action. (R. 6-12).

The District Court, on considering MCI's unopposed summary judgment motion, held that federal jurisdiction

did not exist and dismissed the action (p. 12a, *infra*). The court ruled that MCI's case did not involve the validity, construction, or effect of the Communications Act or any other federal statute; MCI's claim was, in the court's view, grounded upon a state law cause of action, either breach of contract or quantum meruit (p. 15a, *infra*). Concluding that the action did not arise under federal law, the court held there was no federal jurisdiction under section 1331 or 1337 (pp. 12a, 15a, *infra*).[1] MCI timely appealed the District Court's final judgment.

The Fifth Circuit affirmed (p. 10a, *infra*). The appeals court rested its decision upon an analysis of whether MCI's claim arose under federal common law. Relying on *Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the court ruled that the claim did not fall within the limited instances where federal common law exists and concluded (p. 10a, *infra*):

> This case involves MCI's ability to recover on a contract or its ability to recover in quantum meruit. It does not involve the validity, construction, or effect of the Communications Act or any other federal statute. Actions for breach of contract and recovery in quantum meruit have their source in state law, and are consequently not entitled to federal jurisdiction.

The Fifth Circuit denied MCI's timely petition for rehearing. MCI petitioned for a writ of certiorari (No. 92-1566). Credit Builders did not oppose and declined this Court's request to file a response. This Court granted MCI's petition, vacated the Fifth Circuit's judgment, and remanded the case to consider the question of mootness. *MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 113 S.Ct. 2925 (1993) (Appendices B and C, pp. 5a-6a, *infra*).

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[1] The action did not meet the jurisdictional amount to invoke diversity jurisdiction under 28 U.S.C. § 1332.

On remand, the Fifth Circuit reasoned that an indigent defendant cannot be permitted to defeat a lawsuit simply by asserting its poverty. Following the principle that difficulty in formulating a remedy does not evidence the absence of a controversy (*see Goosby v. Osser*, 409 U.S. 512, 517 n.5 (1973), the court held that the mere possibility a judgment debtor may lack the means to satisfy a judgment does not moot a case (pp. 2a-3a, *infra*). The Fifth Circuit concluded that it could not say that MCI would never be able to satisfy its claim against Credit Builders, and found this controversy not moot (p. 3a, *infra*).

On the jurisdictional issue, the Fifth Circuit reinstated its previous opinion without further analysis and affirmed the district court's dismissal for lack of subject matter jurisdiction (pp. 3a-4a, *infra*). On MCI's motion, the court stayed issuance of the mandate through October 23, 1993.

REASONS FOR GRANTING THE WRIT

The Communications Act mandates uniform enforcement of interstate tariff charges. Three circuits have found a carrier's action to collect interstate tariff charges are within a district court's jurisdiction under 28 U.S.C. § 1337. Only the Fifth Circuit has found no jurisdiction and relegated carriers to state law to collect interstate tariff charges. This ruling conflicts with decisions of this Court.

The Fifth Circuit's judgment poses a basic question of federal jurisdiction and administration of the Communications Act. The conflict it creates requires immediate resolution. MCI and other carriers frequently file suits to collect interstate tariff charges. The jurisdictional question arises each time a carrier seeks relief in federal court. Regardless of forum, every suit by a carrier to collect interstate tariff charges presents the governing law issue. Here, as in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983), summary disposition is appropriate because the Fifth Circuit's precedent ob-

structs uniform enforcement of interstate tariff charges and will promote an unacceptable disarray in the law governing interstate tariff services.

I. THE FIFTH CIRCUIT'S DECISION THAT THERE IS NO FEDERAL JURISDICTION OVER AN ACTION TO COLLECT INTERSTATE TARIFF CHARGES CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, AND EIGHTH CIRCUITS.

It is well established that the federal courts have subject matter jurisdiction, under 28 U.S.C. § 1337 or § 1331, over an action by a federally-regulated communications common carrier to collect interstate telecommunications charges fixed by tariff under Section 203 of the Communications Act.[2] The Fifth Circuit's decision conflicts directly with decisions of the Second, Third, and Eighth

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[2] *See MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385 (8th Cir. 1992); *Richman Bros. Records v. U.S. Sprint Communications*, 953 F.2d 1431, 1438 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 3056 (1992); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 494 (2d Cir. 1968). District court decisions include: *MCI Telecommunications Corp. v. Platinum Cruise & Tours, Inc.*, No. 93-CV-344 (N.D.N.Y. Aug. 16, 1933); *MCI Telecommunications Corp. v. Third World Group Trading Co.*, No. Civ. 3-92-16 (D. Minn. Aug. 3, 1992); *MCI Telecommunications Corp. v. Management Solutions, Inc.*, 798 F. Supp. 50 (D. Me. 1992); *MCI Telecommunications Corp. v. Diversified Human Resources Group, Inc.*, No. CA 3-92-0192-T (N.D. Tex. March 14, 1992); *MCI Telecommunications Corp. v. Trees, Inc.*, No. H-91-958 (S.D. Tex. June 12, 1991); *MCI Telecommunications Corp. v. N.I.K.L. of Sioux City, Inc.*, No. 91-4031 (N.D. Iowa May 31, 1991); *MCI Telecommunications Corp. v. Omni Marketing, Inc.*, No. CV-89-191-GF (D. Mont. Feb. 5, 1990); *MCI Telecommunications Corp. v. First American Capital Resources, Inc.*, No. 89-C-1929 (N.D. Ill. Oct. 30, 1989) (1989 U.S. Dist. LEXIS 12879); *MCI Telecommunications Corp. v. Franklin-Centennial Corp.*, 128 F.R.D. 158 (D. Me. 1989); *MCI Telecommunications Corp. v. Direct Marketing Resources, Inc.*, No. 87-1163-A (E.D. Va. Dec. 30, 1987); *American Tel. & Tel. Co. v. Florida-Texas Freight, Inc.*, 357 F. Supp. 977 (S.D. Fla. 1973), *aff'd*, 485 F.2d 1390 (5th Cir. 1973).

Circuits, as well as numerous district court rulings in other circuits.

The Second Circuit held that the district court had jurisdiction over a claim for interstate tariff charges in *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). There, the defendant communications common carrier counterclaimed against its customer for unpaid tariff charges; the issue was whether there was an independent basis for federal jurisdiction over the counterclaims. The Second Circuit analogized from the principle announced in *Louisville & Nashville Railroad v. Rice*, 247 U.S. 201 (1918), that actions to collect interstate freight charges arise under the Interstate Commerce Act: [3]

> [T]he obligation of a user of interstate telephone service to pay for it at the rate fixed by tariff "grow[s] out of and depend[s] upon" the Communications Act in the same way that a shipper's duty to pay for interstate freight service depends upon the Interstate Commerce Act. A complaint seeking to

[3] At issue in *Louisville & Nashville Railroad v. Rice, supra*, were charges fixed by tariff filed pursuant to the Interstate Commerce Act of 1887 ("ICA"). 49 U.S.C. §§ 1-27 (1952 ed.). The common carrier provisions of the ICA were adapted to communications common carriers in the Communications Act so that the judicial interpretations of the ICA would carry over to the Communications Act: *"In this bill [S. 3285] the attempt has been made to preserve the value of court and commission interpretation of that act [the ICA]*, but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers." H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934) (emphasis supplied). *See also* S. Rep. No. 781, 73d Cong., 2d Sess. 2-3 (1934); Senate Hearings Before the Committee on Interstate Commerce on S. 2910, 73d Cong., 2d Sess. 32-33 (1934). *Compare American Broadcasting Cos. v. F.C.C.*, 643 F.2d 818, 822 (D.C. Cir. 1980) (Supreme Court decision under ICA controlling on same issue under Communications Act) *and Electronic Indus. Ass'n v. F.C.C.*, 554 F.2d 1109, 1115 n.16 (D.C. Cir. 1976) (Section 203 of the Communications Act based upon section 6 of the ICA).

> enforce that obligation therefore arises under the Communications Act.

391 F.2d at 494.

The Second Circuit concluded that since actions based on section 203 tariffs arise under the Communications Act, the district court had jurisdiction over the counterclaims under 28 U.S.C. § 1337. *Id.* The Third Circuit reached the same conclusion with respect to an action by U.S. Sprint to collect interstate tariff charges in *Richman Bros. Records v. U.S. Sprint Communications*, 953 F.2d 1431, 1438 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 3056 (1992) (district court "had jurisdiction over the claims under the [Communications] Act brought by Sprint under 28 U.S.C.A. § 1337(a)").

The Eighth Circuit ruled that the district court had section 1337 jurisdiction over MCI's claim for interstate tariff charges in *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385 (8th Cir. 1992).[4] Finding this Court's decisions on federal jurisdiction under the Interstate Commerce Act highly persuasive, the Eighth Circuit held that MCI's claim arose under the Communications Act. *Id.* at 387. It explained the error in the district court's analysis:

> The district court failed to recognize that a claim arises under federal law when a right created by federal law is an essential element of the plaintiff's action. The district court stated MCI's claim brought under an FCC tariff "is simply a contract action seeking to recover payment for services rendered." The district court's characterization of MCI's claim overlooks the fact that federal tariffs are the law, not mere contracts. Although a user's refusal to pay charges fixed by a tariff will often arise in the context of a broken contract, the carrier's claim for pay-

[4] MCI's claims in *Garden State* differed from those raised here only with respect to the identity of the defendant and the amount claimed.

> ment is necessarily based on the filed tariff. The district court was thus confronted with a proposition of federal law in deciding what, if anything, MCI could recover.

Id. (citations omitted).

The Fifth Circuit reached a jurisdictional conclusion contrary to the Second, Third, and Eighth Circuits because it failed to apply a well-established principle: federal, not state, law supplies the rule of decision for claims involving interstate tariff services. Ignoring the basis of MCI's complaint—a federal tariff, the Fifth Circuit held that this case "does not involve" the Communications Act, but has its "source" in state law (p. 10a, *infra*). This ruling also contradicts numerous federal appellate decisions,[5] including two Fifth Circuit precedents,[6] as well as numerous state court rulings.[7]

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[5] *See Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 862 (2d Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987) (federal law preempts state laws); *Palermo v. Bell Tel. Co.*, 415 F.2d 298, 299-300 (3d Cir. 1969) (liability for disconnection of service governed by federal tariff); *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940) (liability for transmission of libelous message governed by federal law); *see also Western Union Tel. Co. v. Esteve Bros.*, 256 U.S. 566, 571-72 (1921) (filing of a federal communications tariff under the ICA precluded application of state law); *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30-31 (1919) (rate for interstate telegram established under the ICA had the effect of excluding state law).

[6] *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) (federal tariff "is the law"); *Florida-Texas Freight*, 357 F. Supp. at 979 (federal tariff exclusively controls rights and liabilities of carrier and customer).

[7] *See Disk 'N' Data, Inc. v. AT&T Communications*, 415 Mass. 886, 616 N.E.2d 76 (1993) (provision of interstate communication service determined according to federal law); *Western Union Tel. Co. v. Crowder*, 547 So.2d 876, 879-880 (Ala. 1989)

The conflict created by the Fifth Circuit's decision needs to be resolved promptly because the jurisdictional question arises in every carrier collection action. In 1992 the issue was presented to four circuits; appeals are now pending before the Sixth and Eleventh Circuits.[8] In the district courts, the issue is a source of continuing confusion and inconsistent decisions.[9]

Moreover, the conflict among the circuits as to the law governing interstate tariff services requires immediate resolution. The Fifth Circuit's decision renders interstate tariff services to customers in Texas, Louisiana, and Mis-

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(federal tariff limitations of liability control); *Komatz Constr., Inc. v. Western Union Tel. Co.*, 290 Minn. 129, 186 N.W.2d 691 (1971), *cert. denied*, 404 U.S. 856 (1971) (federal tariff limitations of liability govern); *Kellerman v. MCI Telecommunications Corp.*, 134 Ill. App. 3d 71, 76, 479 N.E.2d 1057, 1061 (1 Dist. 1985), *aff'd*, 112 Ill.2d 428, 493 N.E.2d 1045 (1986), *cert. denied*, 479 U.S. 949 (1986) (duties and liabilities for interstate communications services governed by federal law); *Housing Authority v. Western Union Tel. Co.*, 124 Ga. App. 181, 184, 183 S.E.2d 227, 229 (1971), *aff'd*, 228 Ga. 447, 186 S.E.2d 100 (1971) (federal tariff preempts state law).

[8] *MCI Telecommunications Corp. v. Graham*, No. 92-6270 (6th Cir. docketed Sept. 30, 1992), and *Western Union Int'l Inc. v. Data Development, Inc.*, No. 92-4981 (11th Cir. docketed Oct. 26, 1992). The Eighth Circuit appeal was decided in *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385 (8th Cir. 1992). The decision in the Fifth Circuit is the subject of this petition.

[9] *See Western Union Int'l, Inc. v. Data Development, Inc.*, No. 92-14211-CIV (S.D. Fla. Sept. 18, 1992), *appeal docketed*, No. 92-4981 (11th Cir. Oct. 26, 1992); *MCI Telecommunications Corp. v. Graham*, No. CIV 1-92-145 (E.D. Tenn. Aug. 24, 1992), *appeal docketed*, No. 92-6270 (6th Cir. Sept. 30, 1992); *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 791 F. Supp. 785 (D. Minn. 1992), *rev'd*, 981 F.2d 385 (8th Cir. 1992); *MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, No. CA 3-91-2298-R (N.D. Tex. May 11, 1992), *aff'd*, 908 F.2d 1021 (5th Cir. 1993), *vacated*, 113 S.Ct. 2925 (1993), *reinstated*, No. 92-1489 (5th Cir. Sept. 7, 1993); *MCI Telecommunications Corp. v. Argos Properties, Inc.*, No. CA 3-90-2755-R (N.D. Tex. April 10, 1991).

sissippi subject to the varying laws of their respective states, while identical services to similarly situated customers in all other states are subject to uniform federal law. Interstate service to a single customer located in both Texas and Oklahoma will be governed by a different law depending on whether suit is filed in federal court in Oklahoma or state court in Texas. The Fifth Circuit's ruling creates a powerful incentive for customers of tariffed services to seek declaratory judgments in state court that they are not required to pay tariff charges. Indeed, customers may even seek such rulings in state courts outside the Fifth Circuit, citing the appeals court's ruling as precedent. This Court should grant the writ to resolve the question of federal jurisdiction and to settle the intolerable conflict over the relevance of state law to federal tariff claims.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

For the past seventy-five years this Court has held that a federal district court has subject matter jurisdiction over an action to collect federal tariff charges. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983); *Louisville & N. R.R. v. Rice*, 247 U.S. 201 (1918). These decisions rest on the principle that actions to collect federal tariff charges involve the validity, construction and effect of the federal statute and tariffs filed pursuant thereto. The right to collect tariff charges grows from the statutory duties of the carrier to collect, and of the customer to pay, all charges set by tariff. *Rice*, 247 U.S. at 202.

In *Rice*, a railroad's claim for charges under a tariff filed pursuant to the Interstate Commerce Act necessarily depended on the construction and effect of that act. Accordingly, the action arose under a federal law regulating commerce. *Id.* at 202-203.[10] Sixty-five years after *Rice*,

[10] Numerous courts consistently applied the rule that a carrier's enforcement of federal rights fell within the jurisdiction of the

this Court reaffirmed its basic rule: "As to interstate shipments . . . the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation." *Thurston*, 460 U.S. at 535, quoting *Rice*, 247 U.S. at 203.[11] The Fifth Circuit's decision, denying federal jurisdiction and limiting carriers to state law causes of action, is irreconcilable with this fundamental principle.

The Fifth Circuit's ruling also conflicts with this Court's decisions on the relevance of state law to federal tariff issues. In *Great Northern Railway v. Merchants' Elevator*, 259 U.S. 285 (1922), where the issue was the construction of an interstate tariff, this Court ruled that federal

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federal district courts. *Chicago & N.W. Transp. v. Atchison, T. & S. F. Ry.*, 609 F.2d 1221, 1225 (7th Cir. 1979); *Maritime Service Corp. v. Sweet Brokerage de Puerto Rico*, 537 F.2d 560, 561-62 (1st Cir. 1976); *Madler v. Artoe*, 494 F.2d 323, 326 (7th Cir. 1974); *Ivy, supra; United States v. Mason & Dixon Lines*, 222 F.2d 646, 651-652 (6th Cir. 1955); *Northern Pac. Ry. v. United States*, 213 F.2d 366 (8th Cir. 1954); *Bernstein Bros. Pipe & Machinery v. Denver & R. G. W. R.R.*, 193 F.2d 441, 445 (10th Cir. 1951); *Atchison, T. & S. F. Ry. v. Springer*, 172 F.2d 346, 349 (7th Cir. 1949); *White v. Atchison T. & S. F. Ry.*, 149 F.2d 919, 920 (9th Cir. 1945); *Clinchfield R.R. v. Boston & Maine Corp.*, 258 F. Supp. 467, 469 (S.D.N.Y. 1966); *Miller v. Ideal Cement Co.*, 214 F. Supp. 717, 718 (D. Wyo. 1963); *Atlantic Coast Line R.R. v. New York Casualty*, 57 F. Supp. 31, 32 (N.D. Ga. 1944); *Gulf C. & S. F. Ry. v. Beatty Brokerage*, 13 F.2d 950, 951 (W.D. La. 1925), *aff'd*, 17 F.2d 480 (5th Cir. 1927).

[11] Since *Thurston*, numerous federal courts have recognized that an action to collect tariff charges falls within their jurisdiction. *See Kansas City Terminal Ry. v. Jordan Mfg. Co.*, 750 F.2d 551, 553 (7th Cir. 1984); *Fisher v. Fleming-Babcock, Inc.*, 745 F.2d 513, 517 (8th Cir. 1984); *Blackburn Truck Lines v. Francis*, 723 F.2d 730, 732 (9th Cir. 1984); *Trailer Marine Transport v. Dolphin Forwarding, Inc.*, 758 F. Supp. 796, 798-799 (D.P.R. 1991); *P.I.E. Nationwide v. New England Tech Air*, 751 F. Supp. 316, 317 (D. Mass. 1990); *Motor Carrier Audit & Collection v. Family Dollar Stores*, 670 F. Supp. 644, 645 (W.D.N.C. 1987). See also district court opinions cited at footnote 2, *supra*.

law controlled. *Id.* at 290. In *Western Union Telegraph Co. v. Esteve Bros.*, 256 U.S. 566 (1921), a tariff filed under the Interstate Commerce Act governed liability for erroneous transmission of an interstate telegram, effectively excluding state law. *Id.* at 571-72.

When the Communications Act became law in 1934, this Court had already ruled that a tariff filed under the Interstate Commerce Act had the force of law and controlled the rights and liabilities of a communications common carrier and its customer [12]; that a carrier was required to collect tariff charges for tariff services [13]; and that an action to collect interstate tariff charges arose under federal law thus giving the district courts jurisdiction.[14] There is no indication that Congress intended a different result under the Communications Act. The Fifth Circuit's decision simply ignores this Court's precedents and the legislative intent.

Federal law is the foundation of MCI's suit to enforce its rights under the Communications Act and a federal tariff. Like the claims by the rail carrier in *Rice*, the motor carrier in *Thurston*, and the communications carrier in *Esteve Bros.*, MCI's claim here relies upon a tariff filed pursuant to federal statute. The rights arising from the Communications Act and the filed tariff are essential elements of MCI's cause of action—just as in this Court's cases involving collection of tariff charges by telegraph, railroad, and trucking companies. Under the holdings of *Thurston* and *Rice*, federal district courts have jurisdiction

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[12] *See Esteve Bros.*, 256 U.S. at 571-572; *cf. Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922) (tariff governs rights of shipper as against rail carrier); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913) (tariff treated as statute, binding upon railroad and shipper).

[13] *See Esteve Bros.*, 256 U.S. at 571-574; *Pittsburgh, C., C. & St. L. Ry. v. Fink*, 250 U.S. 577, 581 (1919); *Louisville & N. R.R. v. Maxwell*, 237 U.S. 94, 97-98 (1915).

[14] *Rice*, 247 U.S. at 203.

to enforce these rights because the actions arise under federal law. The Fifth Circuit's contrary ruling simply disregards these controlling principles.

III. THE FIFTH CIRCUIT'S DECISION FRUSTRATES A CENTRAL POLICY OF THE COMMUNICATIONS ACT—UNIFORM ENFORCEMENT OF INTERSTATE TARIFF CHARGES.

The Communications Act establishes a framework for the federal regulation and enforcement of interstate tariff rates. This regulatory choice embodies a central policy of the Act: rates for interstate tariff services are to be uniformly enforced. 47 U.S.C. §§ 201-203. The Fifth Circuit has concluded, however, that state law governs interstate telecommunications; it has prescribed a state law cause of action to collect interstate tariff charges. Contrary to the Communications Act's clear terms and design, this holding threatens federal uniformity for all types of common carriage, whether by air, rail, truck, radio or cable. The Fifth Circuit's decision effectively subverts Congress' legitimate exercise of its power to regulate interstate commerce.

The Communications Act empowers the FCC to prescribe interstate tariff rates, to order carrier compliance, and to suspend carrier tariffs. 47 U.S.C. §§ 204(a)(1), 205(a).[15] The FCC enforces its orders in federal district court, 47 U.S.C. § 401(b), and carriers may challenge orders only by petition to a federal court of appeals. 47 U.S.C. §§ 204(a)(2)(C) and 402(a); 28 U.S.C. § 2342(1). The Act expressly recognizes that carriers will bring actions to collect tariff charges. 47 U.S.C. § 415(a). It provides a federal forum to resolve tariff rate disputes; a customer may complain to the FCC or sue in federal district court. 47 U.S.C. § 207. If the FCC orders the carrier to pay, the customer may enforce

[15] The sections of the Communications Act cited in this paragraph are reprinted in Appendix F, at pp. 17a-33a, *infra*.

the order in federal district court. 47 U.S.C. § 407. Under this fifty-nine-year-old framework, no appeals court —until now—has held that state law controls a carrier's action to collect interstate tariff charges, or that a carrier may not bring such an action in federal court.

The Fifth Circuit's ruling threatens uniform enforcement of interstate tariff rates. Should this decision stand, carriers in every circuit other than the Fifth will continue to be subject to a uniform body of federal law for tariffed services; carriers in the Fifth Circuit, however, will be left to the vagaries of state law. If, as the Fifth Circuit held, a carrier's right to recover is purely a matter of state contract law, then recovery will likely vary from state to state; if carriers must recover under a theory of quantum meruit, customers may have to pay more or less than the tariff rate, depending on a state court's assessment of the value of the services received. Such a result contravenes a basic goal of tariffed service—to prevent discrimination between customers in the provision of like services. Thus, to permit a carrier's recovery of interstate tariff charges to be dictated by disparate state laws in one part of the country, while in other parts recovery is fixed by uniform federal law, runs counter to a central purpose of the Communications Act.

The Fifth Circuit correctly found that this controversy is not moot. MCI has a claim for monetary relief.[16] A judgment on the merits will have an impact on both Credit Builders and MCI; both parties have a concrete interest in the outcome of the litigation.[17] The Fifth

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[16] *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978) (claim for actual and punitive damages saved case from bar of mootness); *Powell v. McCormack*, 395 U.S. 486, 496-99 (1969) (claim for back salary remained viable).

[17] *Cf. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569 (1984) (inquiry is whether the judgment continues to have an impact on the parties such that the case remains alive);

Circuit's reinstatement of its original decision on jurisdiction, however, renews the conflict among the circuits and with this Court's rulings.

The question presented affects all federally-regulated common carriers and how they perform their duties. Whether filed in state or federal court, suits to recover interstate tariff charges must be governed by uniform federal law. Because the Fifth Circuit's decision represents a significant departure from the principle of uniformity which is central to common carrier regulation, and because it conflicts with the decisions of this Court and the rulings of other circuits, the Court should grant the writ.

Although plenary review would clearly be appropriate, in light of the unusual procedural posture of this case, MCI respectfully suggests that summary reversal is warranted. Credit Builders did not defend the district court's *sua sponte* dismissal before the Fifth Circuit, and declined to respond before this Court, thus depriving this Court of a defense of the Fifth Circuit's judgment. The reasoning behind the Fifth Circuit's judgment, however, is plain from the face of its opinion and is plainly wrong as a matter of law. Summary reversal is precisely the disposition this Court made in a closely analogous situation under the Interstate Commerce Act in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). There, the Ninth Circuit—in conflict with prevailing law in other circuits—held that actions to recover tariff charges under the Interstate Commerce Act did not arise under federal law. Upon a petition for certiorari, this Court concluded that the Ninth Circuit's ruling was so clearly incorrect that summary reversal was appropriate. This Court should follow the same course here.

Permitting the Fifth Circuit's ruling to stand merely because Credit Builders chooses not to defend it would

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Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435, 442 (1984) (as long as parties have a concrete interest, however small, in outcome of the litigation, case is not moot).

create unacceptable incentives for forum shopping and would result in severe disarray in the law governing interstate tariff services. Because the Fifth Circuit's ruling is so plainly incorrect, and the consequences of leaving it undisturbed are so pernicious, summary reversal is warranted in these unique circumstances.

CONCLUSION

The petition should be granted and the Fifth Circuit's judgment should be summarily reversed.

Respectfully submitted,

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October 8, 1993

APPENDICES

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1489

Summary Calendar

MCI TELECOMMUNICATIONS CORPORATION,
Plaintiff-Appellant,

versus

CREDIT BUILDERS OF AMERICA, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

September 7, 1993

On Remand from the Supreme Court
of the United States

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

DUHÉ, Circuit Judge:

MCI Telecommunications Corporation (MCI) sued its customer, Credit Builders of America, Inc. (Credit Builders), to collect unpaid charges for telecommunications services. The district court concluded that it lacked subject matter jurisdiction, and dismissed the case. We affirmed. *MCI Telecommunications Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021 (5th Cir. 1993). The Supreme Court granted certiorari, vacated our decision, and remanded the case with instructions "consider the question of mootness." After considering this issue, we conclude that the controversy is not moot, and reinstate our previous opinion.

I.

At the outset, we note that neither party raised the issue of mootness on appeal. However, we can surmise that the Supreme Court was alerted to this possibility when counsel for Credit Builders, in lieu of a brief, filed the following letter with the Clerk of the Court:

> I regret to inform you that neither my client nor my firm can afford to file a response to this case. My client is out of business and its representatives gone to ground. . . . I cannot reasonably pursue this case without my client's permission or support.[1]

We assume that, based on this letter, the Supreme Court concluded that MCI may no longer have any meaningful remedy and that the case is therefore moot.

II.

We have held that a case is not mooted by the fact that an impecunious judgment debtor may lack the means to satisfy a judgment. *See Cox v. Sunbelt Sav. Ass'n*, 896 F.2d 957, 959-60 (5th Cir. 1990); *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 208 (5th

[1] Likewise, when this case was first heard on appeal, Credit Builders did not file any brief with this court.

Cir. 1989); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 516 (5th Cir. 1985). As we stated in *Triland Holdings & Co.*:

> The general rule is that "[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable. Damages should be denied on the merits, not on grounds of mootness." FSLIC, however, argues that Sunbelt Savings has no assets with which to satisfy a judgment that might be rendered against it, and thus even if Triland Holdings and Triland Investments are successful in proving their claims in the district court they will be unable to collect. We have held that "[d]ifficulties in formulating a remedy in an otherwise living case do not evidence the absence of a case or controversy." In *Ratner*, we went on to hold that "the mere possibility that a judgment debtor lacks the means to satisfy its monetary liability does not kill the issues in a case. An indigent defendant otherwise could defeat any lawsuit simply by asserting that his poverty moots the claims against him."

884 F.2d at 208 (internal citations omitted).

On the record before us, we cannot say that MCI will never be able to satisfy its claim against Credit Builders. Because "[w]e are unable to conclude that all potential forms of relief are permanently precluded," *id.*, the controversy is not moot. *See Cox v. Sunbelt Sav. Ass'n*, 896 F.2d at 960; *Triland Holdings & Co.*, 884 F.2d at 208. Consequently, we reinstate our previous opinion, which affirmed the district court's conclusion that it lacked subject matter jurisdiction over MCI's suit to collect a delinquent phone bill. *See Marshall v. Local Union No. 639, Int'l Bhd. of Teamsters*, 593 F.2d 1297, 1301 n.16 (D.C. Cir. 1979) (If a case can be disposed of on either jurisdictional or mootness grounds, "then a court should not postpone decision while the other ground is investigated.").

III.

For the foregoing reasons, we conclude that the controversy between the litigants is not moot. We reinstate our previous opinion, *MCI Telecommunications Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021 (5th Cir. 1993).

PRIOR OPINION REINSTATED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 92-1566

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner

v.

CREDIT BUILDERS OF AMERICA, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit to consider the question of mootness.

IT IS FURTHER ORDERED that the petitioner, MCI Telecommunications Corporation recover from Credit Builders of America, Inc. Three Hundred Dollars ($300.00) for their costs herein expended.

June 7, 1993

Clerk's costs: $300.00

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-1566

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner

v.

CREDIT BUILDERS OF AMERICA

ORDER ALLOWING CERTIORARI

Filed June 7, 1993

The petition herein for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1489

Summary Calendar

MCI TELECOMMUNICATIONS CORPORATION,
Plaintiff-Appellant,
v.

CREDIT BUILDERS OF AMERICA, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Jan. 12, 1993

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

DUHÉ, Circuit Judge:

MCI Telecommunications Corporation ("MCI") appeals the district court's *sua sponte* dismissal of MCI's suit to collect unpaid charges for telecommunications services provided to Credit Builders of America, Inc. ("Credit Builders"). The district court dismissed the case for lack of subject matter jurisdiction. We find no error and affirm.

Background

From December 1990 through September 1991, MCI provided telecommunications services to Credit Builders in both Texas and Missouri. All services were provided in accordance with the terms of MCI's F.C.C. Tariff No. 1 (the "Tariff"), filed with the Federal Communications Commission. After allegedly not receiving any payment for services rendered, MCI terminated all telecommunication services to Credit Builders. In October 1991, MCI brought this action to recover $38,897.00 for amounts due from Credit Builders under the terms and conditions set forth in the Tariff, plus attorneys' fees and costs. MCI moved for summary judgment and the district court dismissed the case for lack of subject matter jurisdiction.

Discussion

MCI contends that the United States District Courts have independent federal question jurisdiction under 28 U.S.C. § 1331 [1] and jurisdiction over matters arising out of the Communications Act under 28 U.S.C. § 1337.[2] MCI argues that the district court's dismissal of this case should be reversed based on *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2d Cir.1968).

In general, to determine whether a cause of action "arises under" federal law for purposes of federal question jurisdiction, the Supreme Court has stated that a case arises under federal law if "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the

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[1] Section 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[2] Section 1337 states: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress. . . ."

determination of which the result depends." *Gully v. First Nat'l Bank*, 299 U.S. 109, 114, 57 S.Ct. 96, 98, 81 L.Ed. 70 (1936). And it has been held that "federal common law," when it exists, is among the "laws of the United States" referred to in the jurisdictional statute, thus conferring federal-question jurisdiction. *Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

The Second Circuit in *Ivy* held that "questions concerning duties, charges, and liabilities" of carriers are to be governed solely by federal law. *Ivy*, 391 F.2d at 491. The court in *Ivy* concluded the federal interest in telephone companies is so strong and the legislation regulating such companies is so comprehensive that federal common law gives a remedy for tort or breach of contract even though the statutes provide no such remedy, either expressly or impliedly. *Id.* at 491. We are not persuaded by the reasoning in *Ivy*. In fact, the decision in *Ivy* has received much criticism. The decision has been referred to as "extreme" and "questionable." [3]

MCI cites to our decision in *Pennzoil Co. v. Federal Energy Regulatory Com.*, 645 F.2d 360, 385 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982), as following the *Ivy* case. *Pennzoil*, however, cites to *Ivy* for the proposition that in order for all aspects of a contract subject to federal regulation to be governed by federal rather than state law, an independent indication of congressional policy indicating that the contract be ruled by federal common law must be present. *Pennzoil*, 645 F.2d at 385. The Court then goes on to distinguish the case at bar from the *Ivy* case. MCI's reliance on *Pennzoil* is misplaced. While we agree with the general proposition stated in *Ivy*, we believe that the *Ivy* court has gone too far in making "further inroads . . . upon the clear provisions of the Rules of Decision Act

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[3] Charles A. Wright, *Law of Federal Courts* § 60 (4th Ed. 1983).

on the vague grounds of federal interest." [4] We prefer instead to take a more cautious approach with respect to the recognition of federal common law.[5] As the Supreme Court has emphasized, the federal common law is appropriate in only a "few and restricted" circumstances. *Milwaukee v. Illinois*, 451 U.S. 304, 313, 101 S.Ct. 1784, 1790, 68 L.Ed.2d 114 (1981). In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981), the Supreme Court went on to state that "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." We do not believe that this case to collect a delinquent telephone bill falls within these limited instances.[6]

This case involves MCI's ability to recover on a contract or its ability to recover in quantum meruit. It does not involve the validity, construction, or effect of the Communications Act or any other federal statute. Actions for breach of contract and recovery in quantum meruit have their source in state law, and are consequently not entitled to federal jurisdiction.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[4] Currie, *Federal Jurisdiction in a Nutshell* 244 (2d ed. 1981).

[5] Wright, *supra* note 3.

[6] For the same reasons, we do not believe that Section 1337 confers federal question jurisdiction.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-91-2298-R

MCI TELECOMMUNICATIONS CORPORATION,
Plaintiff,

vs.

CREDIT BUILDERS OF AMERICA, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed May 12, 1992]

Plaintiff MCI Telecommunications, Inc. ("MCI") brought this action to recover money due for telecommunications services that it allegedly provided Defendant Credit Builders of America, Inc. ("Credit Builders"). MCI now moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

From December, 1990 until September, 1991, MCI provided telecommunications services at Credit Builders's place of business in Grand Prairie, Texas. Additionally, from February, 1991 until August, 1991, MCI provided telecommunications services to Credit Builders, doing business as Midwest Marketing, in St. Louis, Missouri. All services were provided in accordance with the terms of MCI's F.C.C. Tariff No. 1 (the "Tariff"), filed with the Federal Communications Commission.

After allegedly not receiving any payment for either service, MCI terminated all telecommunications services to Credit Builders in Texas and Missouri on September 13, 1991 and August 27, 1991, respectively. On October 25, 1991, MCI brought this action seeking recovery of THIRTY EIGHT THOUSAND EIGHT HUNDRED

NINETY SEVEN AND NO/100 ($38,897.00) due from Credit Builders under the terms and conditions set forth in the Tariff, plus attorneys' fees and costs.

Analysis

In its Complaint, MCI alleges that this Court has jurisdiction over this case pursuant to three statutes: 28 U.S.C. § 1331, which provides federal jurisdiction for all civil actions arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1337, which provides federal jurisdiction for all civil actions arising under any Act of Congress regulating commerce; and the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1982). MCI alleges that this action involves a federal question arising under the Communications Act of 1934.

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.[1] In this case it appears that summary judgment would be appropriate, and this Court would grant summary judgment, if that were available as an option.

MCI incorrectly filed this case in federal court. Based on the attached opinion, federal jurisdiction does not exist in this case. Therefore, this Court may not rule on MCI's Motion for Summary Judgment. It is therefore

ORDERED that this case is dismissed for lack of subject matter jurisdiction.[2]

SIGNED THIS 11 DAY OF MAY, 1992.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

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[1] Fed. R. Civ. P. 56(e).

[2] This ruling should come as no surprise to MCI, as it was the plaintiff in the attached opinion. In that case, MCI brought suit against the defendant alleging the same claims as it did in this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-90-2755-R

MCI TELECOMMUNICATIONS CORP.,
Plaintiff,

vs.

ARGOS PROPERTIES, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed April 17, 1991]

Plaintiff has brought this action to recover money due for telecommunication services it allegedly provided for Defendant. Now before this Court is Defendant's motion to dismiss the case for lack of federal jurisdiction under Federal Rule of Civil Procedure 12(b)(1). For the reasons that follow, this Court will GRANT Defendant's motion.

ANALYSIS

In Plaintiff's own words, "[t]his lawsuit arises out of Argos' refusal to pay MCI Ten Thousand Six Hundred Nineteen Dollars and Twenty-One Cents ($10,619.21) for telecommunication services provided by MCI. By this action, MCI seeks payment of amounts due from Argos plus costs and reasonable attorneys' fees." [1] In the Complaint, Plaintiff alleges this federal court has jurisdiction

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[1] Complaint ¶ 6, at 3.

over the matter pursuant to three statutes: 28 U.S.C. section 1331 (Supp. 1990), which provides federal jurisdiction for all civil actions arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. section 1337(a) (Supp. 1990), which provides federal jurisdiction for all civil actions arising under any Act of Congress regulating commerce; and the Communications Act of 1934, 47 U.S.C. sections 151-613. Plaintiff thus alleges that this action involves a federal question arising under the Communications Act of 1934.

Section 203 of the Communications Act [2] articulates the method by which telephone companies and other common carriers are to file schedules of charges for approval by the Federal Communications Commission. Plaintiff, after presumably following the procedure set forth in section 203, received from the Federal Communications Commission its MCI Tariff F.C.C. No. 1. Plaintiff states that it provided telecommunication services to Defendant from February 1989 through July 1990 under the terms of MCI Tariff F.C.C. No. 1.[3] According to Plaintiff, Defendant failed to meet payment terms required under the Tariff, and Plaintiff consequently terminated its services to Defendant on July 31, 1990.[4]

Importantly, Plaintiff in his Complaint makes no mention of any specific provision of a federal statute giving rise to his asserted cause of action.[5] While the absence of a citation to a specific federal statute giving rise to the cause of action is not automatically fatal, "it is an orange signal to a federal district court to proceed with

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[2] 47 U.S.C. § 203 (1962 & Supp. 1990).

[3] Complaint ¶ 7, at 3.

[4] *Id.*

[5] *Cf. Frenkel v. Western Union Tel. Co.*, 327 F. Supp. 954, 957 (D. Md. 1971) (analyzing complaint that made no mention of any specific provision of federal statute giving rise to asserted cause of action).

caution." [6] Accordingly, this Court carefully will scrutinize the Complaint to determine whether federal jurisdiction exists.

In determining whether a cause of action "arises under" federal law for purposes of federal question jurisdiction, the United States Supreme Court has stated that a case arises under federal law if "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." [7] This case does not involve the validity, construction, or effect of the Communications Act or any other federal statute. Instead, this case involves either Plaintiff's ability to recover on a contract or Plaintiff's ability to recover in quantum meruit. Actions for breach of contract and for recovery in quantum meruit are actions which have their source in state law, not federal law.[8] Consequently, actions to recover on a contract or in quantum meruit do not arise under federal law and are not entitled to federal jurisdiction.

Additionally, Plaintiff is not entitled to federal jurisdiction on grounds of diversity. While the parties are diverse, the amount in controversy falls far short of the $50,000 minimum that 28 U.S.C. section 1332 (Supp. 1990) requires. Accordingly, Plaintiff incorrectly has filed this case in federal court. As federal jurisdiction does not exist in this case, dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is appropriate.

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[6] *Id.*

[7] *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936) (Cardozo, J.) (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)).

[8] *See Frenkel v. Western Union Tel. Co.*, 327 F. Supp. 954, 957 (D. Md. 1971) (stating that actions for breach of contract ordinarily are not within favor of federal question jurisdiction); *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 129 (1974) (stating that action in quantum meruit has source in state law and not federal law).

CONCLUSION

For the reasons set forth above, this Court GRANTS Defendant's motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1). Accordingly, this case is hereby dismissed with prejudice to refiling the same case in federal court.

SIGNED THIS 10 DAY OF APRIL, 1991.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX F

Title 47 U.S.C.

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. Application of chapter

(a) Applicability to interstate and foreign communications or transmissions of energy originating in or received within the United States by wire or radio; Canal Zone exception; cable services

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but

it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A of this chapter.

* * * *

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

* * * *

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

* * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject

to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * *

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other

provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular

instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and deci-

sion of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 12 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective, or within 15 months after such date if the hearing raises questions of fact of such extraordinary complexity that the questions cannot be resolved within 12 months.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the

Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court

in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No com-

plaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 12 months after the date on which the complaint was filed, or within 15 months after such date if the investigation raises questions of fact of such extraordinary complexity that the questions cannot be resolved within 12 months.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

§ 401. Enforcement provisions

(a) Jurisdiction

The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) Orders of Commission

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of

the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute

Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner precribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

* * * *

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

* * * *

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

§ 406. Compelling furnishing of facilities; mandamus; jurisdiction

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmisison of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: *Provided*, That if any question of fact as to

the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, not withstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further,* That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

§ 407. Order for payment of money; petition for enforcement; procedure; order of Commission as prima facie evidence; costs; attorneys' fees

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

§ 415. Limitations of actions

(a) Recovery of charges by carrier

All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.

(b) Recovery of damages

All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

(c) Recovery of overcharges

For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) Extension

If on or before expiration of the period of limitation in subsection (b) or (c) of this section a carrier begins action under subsection (a) of this section for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) Accrual of cause of action for transmission of message

The cause of action in respect of the transmission of a message shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) Enforcement petition

A petition for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) "Overcharges" defined

The term "overcharges" as used in this section shall be deemed to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission.